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No. 68

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THOMAS R. DAVIS, *Appellant*,

v.

RALPH NEELY AND VIRGINIA GAYLORD NEELY,
Appellees.

On Appeal From the Supreme Court of Oklahoma

APPELLEES' MOTION TO DISMISS THE APPEAL

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1086

THOMAS R. DAVIS, *Appellant*,

v.

RALPH NEELY AND VIRGINIA GAYLORD NEELY,
Appellees.

On Appeal From the Supreme Court of Oklahoma

APPELLEES' MOTION TO DISMISS THE APPEAL

As authorized by this Court's Rule 16, appellees Ralph Neely and Virginia Gaylord Neely respectfully move this Court to dismiss the asserted appeal as of right herein, on the following grounds:

I. THE HISTORY OF THIS LITIGATION

Appellant Thomas R. Davis seeks review of a judgment of the Supreme Court of Oklahoma affirming an adoption decree and underlying rulings entered by the

Children's Court of Oklahoma County, Oklahoma. In substance, appellant urges in his Jurisdictional Statement that the proceedings in the Children's Court were not in conformity with the requirements of the governing Oklahoma statutes, and violated the due process clause and the full faith and credit clause of the Fourteenth Amendment to the Federal Constitution. Appellant contends that this Court has jurisdiction to hear the appeal under 28 U.S.C. Section 1257(2), or, if not, that he is entitled to review by writ of certiorari under 28 U.S.C. Section 1257(3).

An important fact with respect to the history of this litigation does not emerge with any clarity from appellant's Jurisdictional Statement: In the state courts of Oklahoma, appellant never questioned the constitutionality of the state statutes involved, i.e., the Children's Court Act (Title 20 O.S. 1957 Supp. §§ 861-907) and the Uniform Adoption Act (Title 10 O.S. 1961, Chapter 2A).[1] Rather, appellant contended that the adoption proceedings in the Children's Court were in violation of the pertinent statutory provisions.

To the extent that appellant did seek to raise constitutional questions below, these questions related to asserted *judicial* error and abuse of process on the part of the Children's Court. Appellant neither contended nor suggested that the state statutes as applied to him might be repugnant to the Federal Constitution. He did not ask the Supreme Court of Oklahoma to pass upon the constitutionality of the statutes involved, and that Court did not do so.

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[1] The pertinent provisions of these state statutes are set forth in appellant's Jurisdictional Statement, pp. 5-7.

Appellees believe, for the reasons set forth below, that the asserted appeal fails to meet the jurisdictional requirements of 28 U.S.C. Section 1257(2) and that no appropriate ground for discretionary review has been or could be demonstrated by appellant.

II. THE ASSERTED APPEAL AS OF RIGHT MUST BE DISMISSED FOR WANT OF JURISDICTION UNDER 28 U.S.C. SECTION 1257(2)

In an asserted appeal as of right, "Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction." *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70-71. There must be a showing of compliance with the pertinent Rules of this Court as well as with the pertinent jurisdictional statute. *Seaboard Air Line Ry. Co.* v. *Watson*, 287 U.S. 86, 91.

In order to establish that this Court has jurisdiction under 28 U.S.C. Section 1257(2), an appellant must show that the constitutionality of a state statute was timely challenged in the state courts, and that the highest court of the state deemed the question to be at issue and expressly passed on it. *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 651; *Gorham* v. *Washington University*, 316 U.S. 98, 101; this Court's Rule 16.1 (b).

In the case at bar, appellant has not even attempted to show that the constitutionality of a state statute was in issue in the Supreme Court of Oklahoma, and that the court decided the issue in favor of the validity of the statute; nor could he, because no such issue was framed or decided.

In the instant litigation, appellant did not ask the Supreme Court of Oklahoma to determine the validity

of the state statutes involved, or either of them, under the Federal Constitution. He asked only that the court espouse his construction of the statutes. The Supreme Court of Oklahoma rejected appellant's contention, holding that the Children's Court had properly construed and applied the statutes in the adoption proceedings. Such a ruling does not present a Federal question, reviewable by this Court, much less a judgment from which an appeal will lie under Section 1257(2).

The jurisdictional requirements of Section 1257(2) must be rigorously fulfilled. *Memphis Natural Gas Co.* v. *Beeler, supra.* It is essential that there be an *explicit* as well as timely insistence in the state courts that the state statute, as applied, is repugnant to the Constitution, treaties or laws of the United States. *Raley* v. *State of Ohio*, 360 U.S. 423. *Accord, Dahnke* v. *Walker*, 257 U.S. 282.

We submit that this Court's appellate jurisdiction under Section 1257(2) does not extend to the instant case, and that the asserted appeal should be dismissed.

III. THERE IS NO APPROPRIATE GROUND HERE FOR REVIEW ON WRIT OF CERTIORARI

Appellant contends that, if the instant appeal be improvidently taken under 28 U.S.C. Section 1257(2), this Court nevertheless should undertake review on writ of certiorari, under Section 1257(3), of the constitutional questions raised in his Jurisdictional Statement.

In providing for discretionary review of state court cases, Section 1257(3) does not limit jurisdiction as

strictly as does Section 1257(2). However, it clearly requires that there be a *Federal* question, i.e., a question involving "any title, right, privilege or immunity * * * specially set up, or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

As this Court said in *Southwestern Bell Telephone Co.* v. *State of Oklahoma*, 303 U.S. 206, at pp. 212-213:

> We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *Du Saussure* v. *Gaillard*, 127 U.S. 216, 234, 8 S.Ct. 1053, 32 L.Ed. 125; *Johnson* v. *Risk*, 137 U.S. 300, 306, 307, 11 S.Ct. 111, 34 L.Ed. 683; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U.S. 293, 295, 297, 11 S.Ct. 528, 35 L.Ed. 193; *Whitney* v. *California*, 274 U.S. 357, 360, 361, 47 S.Ct. 641, 642, 643, 71 L.Ed. 1095; *Lynch* v. *New York*, 293 U.S. 52, 54, 55 S.Ct. 16, 17, 79 L.Ed. 191.

In the instant case no Federal question was either decided or inherent in the state court's judgment. The two Federal questions on which appellant seeks discretionary review, involving the due process clause and the full faith and credit clause of the Fourteenth Amendment, are not presented to this Court in justiciable form from the litigation below.

A. The Due Process Question

In his Jurisdictional Statement, appellant claims a violation of the due process clause of the Fourteenth Amendment, and seeks to show (pp. 15-18) that the issue was properly and timely invoked in the state courts. However, this was not the case.

As appellant concedes (Jurisdictional Statement, p. 16), his objections and exceptions in the trial court were not based upon the requirements of the due process clause of the Fourteenth Amendment. The fact is, as illustrated by the passage which appellant himself excerpts from the trial record (Jurisdictional Statement, pp. 15-17), the only authorities invoked by appellant were the state statutes involved. Appellant first mentioned the due process clause, in passing, in the closing pages of his briefs in the Supreme Court of Oklahoma.

It is settled law in Oklahoma that the Supreme Court will not consider a question raised for the first time on appeal, save under the most extraordinary circumstances. Thus, in *Bagwell* v. *Finch*, 194 Okl. 416, 152 P. 2d 114, the court refused to consider a *de novo* contention, not raised in the trial court, that the state statute creating Oklahoma's Superior Courts was unconstitutional. In many subsequent decisions, the Supreme Court of Oklahoma has reaffirmed its rule against considering questions raised for the first time on appeal. See, e.g., *Edwards* v. *Pierce*, 376 P. 2d 269; *Vitale* v. *Dunnett*, 365 P. 2d 122; *Sharp* v. *Henry*, 298 P. 2d 1058; *Sims* v. *Bennett*, 255 P. 2d 916, 208 Okl. 312.

A fortiori, the Supreme Court of Oklahoma will not consider questions raised for the first time in reply

briefs or petitions for rehearing. *Brown* v. *State Election Board*, 369 P. 2d 140; *Reed* v. *State Election Board*, 369 P. 2d 156; *Green* v. *Oklahoma State Tax Commission*, 188 Okl. 168, 107 P. 2d 180. Hence it is immaterial that, as appellant asserts in his Jurisdictional Statement (p. 18), more than ten pages of his petition for rehearing in the Supreme Court of Oklahoma were devoted to the due process question.

Even were this case one which involved such issues of public policy as would have justified the Oklahoma Supreme Court in exercising its discretion to consider a question first presented on appeal, one fact appears without any doubt from that Court's opinion (Jurisdictional Statement, Appendix A): no question of due process was discussed or decided.

The Federal question must have been actually decided in the highest court of the state, or that court's judgment must have required its decision. *Southwestern Bell Telephone Co.* v. *State of Oklahoma*, *supra*. In this case, as is set forth below, the Supreme Court of Oklahoma based its decision on adequate non-Federal grounds.

B. Full Faith and Credit Question

Appellant asks, if the question of due process is answered adversely to appellant, "that the Court reach the question expressly reserved in *Kovacs* v. *Brewer*, 356 U.S. 604 * * * and *Ford* v. *Ford*, 371 U.S. 187", as to whether a foreign custody decree is entitled to full faith and credit in the absence of a change of circumstances. This question was likewise not reached

or decided by the Supreme Court of Oklahoma, nor was its decision necessary to the judgment rendered.[2]

Where a state court rests its decision upon wholly non-Federal grounds, this Court has held that it will not consider the adequacy or correctness of such grounds unless they appear to be an obvious subterfuge to evade consideration of a Federal question. *Radio Station WOW* v. *Johnson*, 326 U.S. 120. And if the non-Federal grounds of the decision are adequate, "the existence of a federal question is of no significance." *Bilby* v. *Stewart*, 246 U.S. 255, 257. In any event, if the non-Federal grounds of the decision appear reasonable, the burden is upon the losing party, in order to establish this Court's jurisdiction, to show that such grounds are inadequate. *Durley* v. *Mayo*, 351 U.S. 277, 281.

Appellant acknowledges that the question of the full faith and credit clause was not reached by the Oklahoma court. He states:

> The Oklahoma Supreme Court did not pass upon the applicability of the Full Faith and Credit Clause, but based its affirmance upon a ruling that the trial court had the power, in and of itself, to deprive appellant of all custody and visitation rights, and thus dispense with his consent to the adoption * * *. (Jurisdictional Statement, p. 15).

In the instant case, we submit, it is clear that the non-Federal grounds set forth in the opinion of the Su-

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[2] Even had the Oklahoma court reached the question of full faith and credit, this case would not present the question reserved in *Halvey*, *Kovacs* and *Ford*, since the record is replete with evidence of changes of circumstances since the modification of the California decree.

preme Court of Oklahoma (Jurisdictional Statement, Appendix A), are fully adequate to support its decision. The court points out that the statute creating the Children's Court expressly authorizes the court to determine the custody of any child living within the jurisdiction of the court; that such power as to resident children is clearly sanctioned by the doctrine of *parens patriae;* and that, in the case at bar, the Children's Court duly exercised this power to divest the appellant of all parental rights, including the right to custody. The court then goes on to hold that the procedures followed by the Children's Court in the instant adoption proceeding were entirely in accord with the provisions of the governing adoption act.

What the statutes of a state mean, the extent to which any provision may be limited by other acts or by other parts of the same act, are questions on which the highest court of a state has the final word. *Musser* v. *State of Utah*, 333 U.S. 95. Insofar as the decision of a state court involves construction of the state's constitution or laws, it is not reviewable by this Court. See, e.g., *Southern R. Co.* v. *Wright*, 151 U.S. 470, *Atchison T. & S.F.R. Co.* v. *Railroad Commission*, 283 U.S. 380, and *Screws* v. *U. S.*, 325 U.S. 91.

We submit that the non-Federal grounds of the decision reached by the Supreme Court of Oklahoma are wholly adequate. Certainly appellant has not discharged his burden of showing that they were inadequate, given the issues raised, or that they constituted an obvious subterfuge to evade a Federal question. Moreover, appellant has made no showing that the Federal questions he now asserts—even if they were justiciable—are of such importance as to merit review on writ of certiorari.

CONCLUSION

For all the foregoing reasons, we respectfully submit that the asserted appeal herein does not meet the jurisdictional requirements of 28 U.S.C. Section 1257 (2), and does not present appropriate grounds for review on writ of certiorari under 28 U.S.C. Section 1257(3); hence the appeal should be dismissed.

Respectfully submitted,

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